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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Supreme Court No. .....

Court of Appeals No. 19,621

MATTHEW RUBINO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, by his attorney Joseph W. Louisell, prays that a Writ of Certiorari issue to review the judgment heretofore entered against him by the United States Court of Appeals, Sixth Circuit.

1. OPINIONS BELOW

The opinion of the United States Court of Appeals, Sixth Circuit, decided and filed on July 30, 1970 and judgment in accordance with that opinion, hereinafter set forth (Appendix A, *infra*, p. 13, et seq.) is not yet officially reported.

2. JURISDICTION

The judgment of the United States Court of Appeals, Sixth Circuit, was decided and filed on July 30, 1970; with an extension of time to November 9, 1970 granted by this Court within which to file this Petition for Certiorari. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

3. QUESTION PRESENTED

Whether reversible error was committed when the Trial Court denied petitioner's motion for a mistrial, which motion for a new trial was predicated upon the fact that certain members of the jury had read newspaper stories during the trial in which the petitioner was stated to be a reputed member of the "Mafia" and had the sobriquet of "The Enforcer" and defense counsel was referred to in highly uncomplimentary terms.

4. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions involved herein are set forth in Appendix B, *infra*, p. 30, et seq.:

Fifth Amendment to the Federal Constitution.

Sixth Amendment to the Federal Constitution.

5. STATEMENT OF THE CASE

Petitioner was found guilty on each count of a four-count Indictment charging him with wilful attempts to evade and defeat his individual income taxes for the years 1958 through 1961.

Petitioner was sentenced to 3½ years imprisonment on each count, the sentences to run consecutively, and was fined $10,000.00 on each count. Petitioner appealed the conviction to the United States Court of Appeals for the Sixth Circuit, which Court in a 2-1 decision filed and decided July 30, 1970 affirmed the conviction.

A Petition for Rehearing was filed and denied by the Court of Appeals for the Sixth Circuit on September 10, 1970 (Appendix C, *infra*, p. 31).

The Government's proofs rested on a net-worth theory, and petitioner's income was established by that method. The trial had begun in the Federal District Court for the Eastern District of Michigan on November 18, 1968 with attorney Joseph W. Louisell of the Michigan Bar as petitioner's lawyer. Trial was completed on January 29, 1969, on which date the verdict of guilty was rendered. On

January 21, 1969, prior to the time the jury went into deliberations, in an entirely unrelated case the Honorable Victor J. Baum, Circuit Judge for Wayne County, Michigan, rendered an opinion denying a motion for a new trial for one Vito Giacalone in a prosecution culminating in Giacalone's conviction for possession of a blackjack—a felony in Michigan. This decision was announced by way of a ninety-page opinion. Giacalone, like petitioner, had been represented by Joseph W. Louisell, and on January 21 the *Detroit News* ran a story on the subject, as did the *Detroit Free Press* the following day (Appendix D, *infra*, p. 32 et seq.). The content of the articles may be capsulized by quoting from the Court of Appeals' majority opinion:

> "*The Detroit News* story featured pictures of Mr. Louisell and Judge Baum, and appeared under a headline proclaiming, 'Louisell Accused of "Cat and Mouse" Game—Baum Rebukes Vito's Lawyer.' It quoted Judge Baum as accusing Mr. Louisell of making 'a sham claim of hospitalization' to delay the trial for months and stated that Louisell was guilty of 'a ruse and a pretext.' *The Free Press* article made no mention of Rubino. *The Detroit News* stated, in four lines which were the eleventh paragraph in the latter story, that:
>
> > 'Matthew (Mike the Enforcer) Rubino, reputed Mafia leader, has since gone to trial for income tax evasion in the Federal Court with Louisell as his lawyer. The trial is now in its second month.'
>
> *The Free Press* story appeared under the headline 'Judge Accuses Louisell of Plot.' It opened with this sentence:
>
> > "A judge accused Joseph Louisell, one of Detroit's most expensive and sought after defense attorneys, of using a subterfuge in an attempt to delay the trial of one of his clients, Mafia leader Vito Giacalone.'

> It then went on to quote Judge Baum as having said in his opinion, 'There ought not to be one law for the rich and another for the poor. We do not allow the poor, unreasonably, to dam the flow of the court's business. We should not permit Vito Giacalone or Joseph Louisell unreasonably to delay justice.' This story was also accompanied by photographs of Judge Baum and Mr. Louisell."

Immediately following the publication of these stories the Court, pursuant to motion made on behalf of the petitioner, agreed to *voir dire* the 14-member jury panel out of the presence of each other. As Judge Peck stated in his dissent,

> "For reasons which become apparent upon a reading of the transcript, it is impossible to state with certainty exactly how many members of the panel had read certain articles or had heard discussions concerning them in the jury room. A fair reading of the transcript of that hearing, however, would seem to establish that two members read the article in the *Detroit News*, two read the article in the *Detroit Free Press*, while another stated that he read an article without specifying the paper. Five other jurors stated that they saw one or another of the articles but did not read them. Only four of the fourteen testified that they had neither seen nor read either of the accounts."

The District Court made a finding, in substance, that the members of the jury were not influenced by the newspaper publicity and were able to render a fair and impartial verdict based on the evidence. As stated earlier, the jury returned a verdict of guilty as to each of the four counts contained in the Indictment and the United States Court of Appeals for the Sixth Circuit affirmed the conviction by a 2-1 vote. A Petition for Rehearing was filed and denied.

6. REASONS FOR GRANTING THE WRIT

It is respectfully submitted that in affirming the judgment of the District Court the Court of Appeals for the Sixth Circuit committed error of constitutional proportions.

The matter of newspaper articles containing factual data which was obtained outside of any information revealed in the course of the trial and which was not admissible in evidence, has given rise to increasing concern by appellate courts throughout the nation. *Quintana v. People* (Colo.), 405 P.2d 740. It has been suggested that the problem is incapable of a satisfactory solution. Media of publicity have the right to report what happens in open court. An accused has a right to a trial by an impartial jury on evidence which is legally admissible. The public has the right to demand and expect fair trials designed to end in just judgments. These rights must be accommodated in the best possible manner. But when an article of great prejudice to an accused is published in the midst of his trial, the right to publish may not destroy the right to a fair trial. *Mares v. United States*, 383 F. 2d 805. Newspapers, it has been said, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to a fair trial. *Shepherd v. State of Florida*, 341 U.S. 50, 71 S. Ct. 549. It has also been said that it is the right of a defendant accused of crime to have nothing reach the mind of the jury concerning the case except strictly legal evidence admitted according to law, and if facts prejudicial to him reach the jury otherwise, it is the duty of the trial judge to grant a new trial. *Griffin v. United States*, 295 F. 437.

There is no question that the material of the newspaper articles concerning the petitioner and Mr. Louisell, his

counsel, would not under any circumstances be deemed by the Trial Court to be competent or relevant evidence in the trial of petitioner. It is also beyond question that the substance of the newspaper articles was highly prejudicial to petitioner. The term "Mafia" today arouses the same fear verging on hysteria that the term "communism" aroused some two decades ago when Senator Joseph McCarthy served in the United States Senate. Any slightest mention of one's name in association with "known" communists or "communistic organizations" was sufficient in those days to cast one under the darkest suspicions and lead to such serious consequences as discharge from his employment and in many cases complete social ostracism.

Today, with the subject of the "Mafia" being constantly and sensationally mentioned in all the news media—television, radio, newspapers, periodicals, movies and the Congressional Record—the impression is widespread that the life of the commonwealth is about to be crushed to death by the ubiquitous tenacles of this clandestine, mysterious and all-powerful organization, the "Mafia."[1] Under these circumstances, it is not at all suprising that jurors could be influenced by newspaper stories which through egregiously erroneous statement or invidious innuendo taf defendants or their counsel with the brush of membership or association with the nefarious "Mafia."

The record discloses that of the fourteen jurors (twelve and two alternates), five jurors read an article (two read the *Detroit News* article, two read the *Detroit Free Press* article and one didn't specify), five jurors were aware of the article or of the headline of the article or of the photo-

[1] So inflamatory is the word "Mafia" that by executive order the Attorney General has declared that no member of the Department of Justice is to use it.

graph of Mr. Louisell (two saw the material in the *Detroit News*, two saw the material in the *Detroit Free Press* and one saw the material in both newspapers). Four jurors stated that the article or articles or the photograph had been discussed in the jury room. *Of great significance is the fact that the Court bailiff recovered from the jury room two copies of the Detroit Free Press containing offending articles on the morning of January 22, 1969.*

It should be noted that in *Briggs v. United States*, 221 F. 2d 636, the Court observed on appeal that there was no direct evidence that the newspaper articles were read by any juror, but that it was obvious that one or more of the jurors probably did read them. Then the Court quoted with approval *Meyer v. Cadwalader*, 49 F. 32, in which the Court concluded that members of the jury had read the offending articles because of the wide dissemination of the publications carrying them in the community.

> It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of each session of the court, and it is incredible that, going out into the community, they did not see and read these newspaper publications. That these published statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss it. Good ground, therefore, here appears for setting aside the verdict.
>
> *Meyer v. Cadwalader*, 49 F. 32.

In the instant case, it is clear that five jurors read either the *Detroit News* article or the *Detroit Free Press* article, that some of the members of the jury read the *Detroit*

Free Press article in the jury room since two copies of the *Detroit Free Press* were taken out of the jury room on the morning of January 22, 1969, and that the matter and content of the articles were discussed in the jury room among some members of the jury. It would be idle to say that these jurors were not influenced in the least by knowledge that a judge had criticized Mr. Louisell as "playing cat and mouse" with the Court and by mention of his client in the Circuit Court matter as a leader of the "Mafia" and by reference to Mr. Rubino as a "Mafia" figure and as the "Enforcer."

The leading case on this subject is *Marshall v. U. S.*, 360 U.S. 310. There, newspaper articles concerning the criminal record of the defendant were seen and read by certain members of the jury. The Court in granting a new trial said as follows:

> The trial judge on learning that these news accounts had reached the jurors summoned them into his chamber one by one and inquired if they had seen the articles. Three had read the first of the two we have listed above and one had read both. Three others had scanned the first article and one of those had also seen the second. Each of the seven told the trial judge that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles. The trial judge, stating he felt there was no prejudice to petitioner, denied the motion for mistrial.
>
> [3, 4] The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. *Holt v. United States*, 218 U.S. 245, 251, 31 S.Ct. 2, 6, 54 L.Ed. 1021. Generalizations beyond that statement are not profitable, because each case

> must turn on its special facts. We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. Cf. *Michelson v. United States*, 335 U.S. 469, 475, 69 S.Ct. 213, 218, 93 L.Ed. 168. It may indeed be greater for it is then not tempered by protective procedures.
>
> *Marshall v. United States*, 79 S. Ct. 1171, pp. 312, 313.

In *Shepherd v. State of Florida, supra,* jurors said that they had read newspaper accounts that the defendant had confessed. The Court in reversing the conviction, observed that if the prosecutor had told the jury that the accused had confessed but did not offer to prove the confession, the Trial Court would undoubtedly have declared a mistrial.

The *Marshall* and *Shepherd* cases, *supra,* explicitly state the criteria by which such matters must be tested by the Court in considering a motion for a mistrial. Would the matter read by the jurors in a newspaper article be grounds for the declaration of a mistrial if introduced deliberately or inadvertently in testimony on trial of the cause? It is respectfully urged that if the contents of the articles appearing in the *Detroit News* and the *Detroit Free Press* were mentioned during the course of the trial in the presence of the jury—that Mr. Louisell had played "a cat and mouse game" with the Court in his defense of an "insidiously dangerous" "Mafia leader" to come under the "protective umbrella of the Rubino trial," Rubino being "Matthew (Mike the Enforcer) Rubino, reputed Mafia leader"—the Trial Court would have found that such material was highly prejudicial to petitioner and without hesitation, the trial judge would have declared a mistrial.

It is true that the Trial Court has a wide discretion in declaring a mistrial under these circumstances. "But newspaper publicity may be of such a character as to result in prejudice to the defendant and to cause a mistrial." *Briggs v. United States*, 221 F. 2d 636. The exact effect of the contents of these articles on the minds of the jurors cannot be determined. But this Court should not stop to analyze or seek to determine what effect this unwarranted matter had on the jurors' minds; the fact is that the matter reached the jury and it had no place in the jurors' minds. In *McKibben v. Philadelphia & R. Ry. Co.*, 251 F. 577, the Court upon learning that a juror had taken a newspaper article concerning the matter in trial into the jury room and reading it to the other jurors, said:

> "We are not disposed to analyze or seek to determine just what problematic effect this unwarwanted matter had on the jurors' minds, or at what stage of the proceedings the jury determined to have the article read. The noxious fact is that it had no place in the jury room, and that it was there, and was, at the request of the entire jury, read and heard."

Recent cases in which convictions were reversed on appeal because jurors had read newspapers and thus had come by material which it would have been improper to introduce on trial are the following: *Holmes v. United States*, 284 F. 2d 716 (sentence on a prior conviction); *United States v. Kum Seng Seo*, 300 F. 2d 623 (bail of $100,000 engendering suspicion that defendant was a notorious or dangerous criminal); *Henslee v. United States*, 246 F. 2d 190 (contents of government motion reflecting that defendant embezzled funds); *Mares v. United States*, *supra* (confession of defendant denied admission into evidence); *Quintana v. People*, *supra* (codefendant serving term and defendant referred to as ex-convict); *Shepherd*

v. State of Florida, supra, (confession by defendant); *Briggs v. United States,* 221 F. 2d 636 (judge had cited two witnesses for perjury and jailed them).

The *Kum Seng Seo* case, *supra,* is of special importance for the reason that the Court regarded knowledge on the part of the jurors that defendant was under $100,000 bail as prejudicial to defendant because they would probably regard this as evidence of the dangerous criminal character of defendant. How much more prejudicial is the assertion in the instant case that Mr. Rubino was a reputed Mafia leader and known as the "Enforcer." Also significant is the fact that the Court considers *Marshall, supra,* as binding authority on the Court to grant a new trial when it is shown that jurors have read news accounts containing inadmissible and inaccurate facts prejudicial to the petitioner.

Marshall, supra, should be controlling here. Improper material highly prejudicial to the petitioner was seen by several members of the jury. The Trial Court should have declared a mistrial. Failure to do so is reversible error.

7. CONCLUSION

For the reasons aforementioned, petitioner does pray that a Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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Detroit, Michigan 48226

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

No. 19621

United States of America,
Plaintiff-Appellee,

v.

Matthew Rubino,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed July 30, 1970.

Before Phillips, Chief Judge, and Peck and Brooks, Circuit Judges.

Phillips, Chief Judge. Defendant-appellant (usually hereinafter "Rubino") was found guilty by jury verdict of each count of a four-count indictment charging willful attempt to evade and defeat his individual income taxes for the years 1958 through 1961. The trial extended over a period of nine weeks and Rubino was sentenced to two and

one-half years imprisonment on each count, the sentences to run consecutively, and was fined $10,000 on each. His motion for a new trial on the basis that the court erred in not having granted a judgment of acquittal and in not declaring a mistrial was overruled, and this appeal followed.

The government's case was presented on a net worth-expenditures basis, and his income was established by that method. Rubino produced no personal books or records and advised Treasury agents at the beginning of their investigation that he would answer no questions. He maintained no bank account and conducted all of his business in currency, cashier's checks or money orders, and five or six months work by agents produced about twelve hundred cashier's checks which he had bought during the prosecution years. Rubino did not at any time during the investigation supply information that would account for any of the unreported income disclosed by the investigation.

Rubino's taxable income and income tax, in each instance both as reported and corrected, and their relationship to the counts of the indictment appear in the following table:

		Taxable Income		Income Tax	
Count	Year	Reported	Corrected	Reported	Corrected
I	1958	$ 31,637.79	$ 61,166.71	$10,371.51	$ 27,305.11
II	1959	1,536.73	56,832.46	487.35	23,953.39
III	1960	26,114.57	70,081.93	7,925.26	32,526.12
IV	1961	42,134.72	56,801.10	15,538.75	24,161.11
		$101,423.81	$244,882.20	$34,322.87	$107,945.73

In the course of the lengthy trial objections were made to the introduction by the government of both testimony and documentary exhibits and to other rulings of the trial judge, all of which have been preserved for review and constitute alleged prejudicial error. Passing those items for the moment, we first consider the contention of Rubino that

publicity in Detroit newspapers, which occurred during the closing days of the trial, requires a reversal of the conviction.

The trial of this case began in the District Court November 18, 1968, with Attorney Joseph W. Louisell of the Detroit, Michigan, bar as Rubino's counsel. It continued through January 29, 1969, on which day the guilty verdict was returned. However, on January 21, 1969, in an entirely unrelated matter the Honorable Victor J. Baum, Circuit Judge for Wayne County, Michigan, announced his decision denying a motion for a new trial for one Vito Giacalone in a case resulting in the latter's conviction on a felony charge, and the announcement was in the form of a 90-page opinion. Giacalone had been represented by Mr. Louisell, and on January 21 the *Detroit News*, an afternoon newspaper, ran a story on the subject as did *The Detroit Free Press*, a morning newspaper, the following day. *The Detroit News* story featured pictures of Mr. Louisell and Judge Baum, and appeared under a headline proclaiming, "Louisell Accused of 'Cat and Mouse' Game—Baum Rebukes Vito's Lawyer." It quoted Judge Baum as accusing Mr. Louisell of making "a sham claim of hospitalization" to delay the trial for months and stated that Louisell was guilty of "a ruse and a pretext." *The Free Press* article made no mention of Rubino. *The Detroit News* stated, in four lines which were the eleventh paragraph in the latter story, that:

> "Matthew (Mike the Enforcer) Rubino, reputed Mafia leader, has since gone to trial for income tax evasion in the Federal Court with Louisell as his lawyer. The trial is now in its second month."

The Free Press story appeared under the headline "Judge Accuses Louisell of Plot." It opened with this sentence:

> "A judge accused Joseph Louisell, one of Detroit's most expensive and sought after defense attorneys, of using a subterfuge in an attempt to delay the trial of one of his clients, Mafia leader Vito Giacalone."

It then went on to quote Judge Baum as having said in his opinion, "There ought not to be one law for the rich and another for the poor. We do not allow the poor, unreasonably, to dam the flow of the court's business. We should not permit Vito Giacalone or Joseph Louisell unreasonably to delay justice." This story was also accompanied by photographs of Judge Baum and Mr. Louisell.

Immediately following the publication of these newspaper stories, a motion was made on behalf of Rubino to see which, if any, members of the jury had read them. Under a plan agreed to by counsel, each of the fourteen member jury panel (including the two alternates) was individually called from the jury room into the courtroom and there questioned by the trial judge. Following such interrogation, each juror was then escorted into the Court's chambers to prevent discussion with the remaining jurors prior to their questioning.

Four of the jurors testified that they had not seen either news story and five of the others said they had read only a headline. Eleven of the jurors were asked whether there had been any discussion of the articles in the jury room. This question was not directed to the first three jurors since it was not suggested until after they had been questioned. All eleven agreed that there had been no discussion, although three jurors stated that one of the articles was *mentioned* in the jury room. Apparently one of these three jurors had mentioned the article or the photograph of Mr. Louisell to the other two. Five of the jurors had read one of the articles or a part of one of them. All jurors stated that the articles would have no influence on their verdict.

It is re-emphasized that the article in *The Detroit Free Press* related entirely to the trial of another defendant in the Wayne County Circuit Court. It made no reference to Rubino, the appellant herein. The story in *The Detroit News* also was directed to the same State court trial. In the four-line eleventh paragraph of the latter story, however, there was a recitation that Mr. Louisell was serving as counsel for Rubino in a trial which then was in its second month in the United States District Court. This paragraph described Rubino as a "reputed Mafia leader." This news story was published in at least two editions of *The Detroit News*. In the earliest edition the entire article appeared on the front page. In the succeeding edition or editions the article began on the front page but part of it was continued to an inside page. The paragraph relating to Rubino appeared on the inside page and not on the front page of the later edition or editions.

Of the five jurors who had read any part of either of the two articles, two had read *The Free Press* story which contained no mention of Rubino. One juror had read "a little bit" of one of the stories, but did not specify which newspaper. One juror had read the entire article in *The News*. The fifth had read only a portion of this article, and testified that she had read none of that part on the inside page, indicating that the edition she saw was a later edition in which the paragraph concerning Rubino appeared on the inside page, rather than the earliest edition in which the entire article was printed on the front page. The record demonstrates to our satisfaction that the import of the testimony of this fifth juror was to the effect that she did not read the paragraph relating to Rubino.

Thus the record establishes affirmatively that only one juror read the paragraph in which Rubino was mentioned as to which prejudice is claimed. Defense counsel did not

request the District Judge to remove from the panel this juror who had read the entire article in *The Detroit News*, including the paragraph relating to Rubino. The two alternate jurors had not read the news stories in either of the papers and under the proof were unaware of any newspaper reference to Rubino as a reputed member of the Mafia. These two alternate jurors were available to have replaced any disqualified juror. No request was made for the replacement of any juror by an alternate.

Two copies of *The Detroit Free Press* of January 22, 1969, were recovered from the jury room by the bailiff. These papers made no mention of Rubino, and the evidence was that they had not been read by the jurors except to the extent narrated in this opinion.

The District Judge, basing his determination on his personal interrogation of the jurors who read the article or saw the headline referring to Mr. Louisell, made an affirmative finding of fact to the effect that the members of the jury were not influenced by this newspaper publicity and were competent to render a fair and impartial verdict in the case.

In his charge to the jury the District Court gave the affirmative instruction that "You are to consider only the evidence in this case." With respect to the newspaper stories, he told the jury as follows:

> "Now, last week there appeared in the newspapers certain stories concerning Mr. Louisell in connection with another client, in another court. Some of you jurors read some or all of the newspaper accounts. The Court questioned you separately in an attempt to learn if those newspaper stories could in any way influence you in your judgment in this case. I tell you that if I had the slightest reason to believe that those

stories might in any way, consciously or otherwise, affect your attitude or disposition toward this defendant or this case, I would unhesitatingly have declared a mistrial, selected a new jury and retried the case. It is because you have convinced me that what you read, heard or discussed could in no way affect your judgment in this case that I have not done so. I am thus prepared to give this case to you for your determination with an absolute confidence that nothing that appeared in the papers will in the slightest affect the outcome of this case."

The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles relating to the trial. *Marshall v. U. S.*, 360 U.S. 310, 312. "Generalizations beyond that statement are not profitable, because each case must turn on its special facts." *Marshall v. U. S., supra,* at 312.

In our opinion the contents of these two newspaper articles do not measure up to the degree of prejudice which resulted in reversal in *Marshall.* The article in *Marshall* contained highy prejudicial material which was read by seven of the twelve jurors. Those articles, among other things, made it clear that the defendant in that case twice previously had been convicted of felonies. It was held under the circumstances in *Marshall* that the defendant was deprived of a fair trial, despite the assurance by the jurors that the reading of the articles would not influence their verdict.

In the present case, where it is not shown that the newspaper stories came through or from the prosecution, it is our opinion that the burden of establishing that he has been treated unfairly rests upon Rubino. *Marshall v. U. S.*, 355 F. 2d 999, 1007 (9th Cir.), cert. denied, 385 U.S. 815, re-

hearing denied, 385 U.S. 964. Rubino, in our opinion, has made no such showing in the record in the present case.

In our opinion the reported criticism by the State trial judge of Mr. Louisell's pre-trial activity in a wholly unrelated case was not sufficient, standing alone, to call for a new trial.

A more serious question is presented by *The Detroit News* article, which, although devoted almost wholly to the case in the Wayne Circuit Court, made reference in the eleventh paragraph to the fact that Rubino's trial for income tax evasion in the United States District Court was in its second month and mentioned him as a reputed member of the Mafia. The possibility that this paragraph may have influenced the verdict of the jury is minimized considerably by the fact that only two jurors are shown to have read any part of *The Detroit News* article containing this paragraph. Mrs. Zurvalec, who said she read the entire article, testified as follows:

> "Q. Yesterday certain news reports appeared regarding Mr. Louisell. The court would like to ask you, Mrs. Zurvalec, whether or not you have seen any news articles?
>
> "A. Yes, I did see that article in the News.
>
> "Q. If you saw this article, did you read it or any part of it?
>
> "A. I read it, yes.
>
> "Q. Has what you read influenced your ability to render a fair and impartial verdict in this case.
>
> "A. I would say not. Well, it referred to another case, primarily, and I don't think it would have any bearing on this.
>
> "Q. Did you hear any radio reports regarding Mr. Louisell?
>
> "A. No, I didn't."

Mrs. Selewski, the only other juror shown to have read any part of the stoy in *The Detroit News*, testified that: "I read the front part of the paper, but I didn't get to the inside." Since the paragraph relating to Rubino was in that portion of the news story continued to the inside from page one in all except the earliest edition, we conclude, as hereinabove stated, that Mrs. Selewski did not read the paragraph referring to Rubino.

The only other juror who may have seen any part of the story in *The Detroit News* under the evidence in the record was Mr. Stackpoole, who did not specify which article he saw. Even if it be assumed that Juror Stackpoole was referring to the *Free Press* story, the reading of a "little bit" presumably would not have included the eleventh paragraph which appeared on an inside page in all except the earliest edition.

Thus the record shows that of the fourteen jurors there was only one who is shown definitely to have read the entire article, including the four-line paragraph alleged to be prejudicial. We do not consider it to be without significance that defense counsel could have requested that this juror be replaced by an alternate, but failed to do so.

It is to be emphasized that these newspaper stories did not involve the trial in the United States District Court here on appeal, but to the contrary reported on a State court trial.

There is no contention that any of this publicity was generated by a representative of the United States. To the contrary the release of this publicity was beyond the control of the United States Attorney and United States District Judge who presided over the trial in the present case.

Throughout the trial the District Judge repeatedly cautioned the jury against reading any newspaper articles re-

lating to the pending case or listening to any radio or television broadcasts concerning it.

The question on this appeal is whether two newspaper articles critical of defense counsel in an unrelated case, which was read in part by not more than five jurors, requires reversal of Rubino's conviction. In a period of recurring clashes between the right of free press guaranteed by the First Amendment and the right of trial by jury guaranteed by the Sixth Amendment, we are unwilling to reverse a conviction under the circumstances of the present case. In the absence of affirmative evidence of deprivation of a fair trial, we decline to establish a precedent which conceivably could permit counsel, purposely or otherwise, to obtain unfavorable publicity concerning himself in a local newspaper and thereby make it virtually impossible for a valid conviction to be effected against one of his clients in an unrelated case.

U. S. v. Cimini and *O'Malley*, — F.2d — (Nos. 20,002-03, June 1, 1970, 6th Cir.) involved a factual situation concerning newspaper publicity which is similar to the facts in the present case. During the course of that trial publicity appeared in Detroit newspapers which was unfavorable to defense counsel. The record showed that most of the jurors at least were aware of the publicity and that it may have been mentioned in the jury room. Upon questioning by the Court, each juror testified that no publicity or any mention of it had affected his ability to render a fair and impartial verdict.

This Court affirmed the convictions, holding that there was not a sufficient showing of prejudice to justify reversal.

To like effect see *U. S. v. Andrews*, 347 F.2d 207, 211 (6th Cir.), cert. denied, 382 U.S. 956, rehearing denied, 382 U.S. 1021.

In summary, the District Judge, after interrogating each juror separately, did not find the "slightest reason" to believe that the newspaper articles could influence the verdict in any manner. We conclude that the District Judge properly exercised his discretion by giving adequate cautionary instructions and overruling the motion for a mistrial.

We comment briefly upon other contentions made by Rubino. One argument is that prejudicial error occurred when during its opening statement to the jury the government was permitted, over his objection, to use a chart demonstrating the tax obligation of a fictitious "John Doe," which chart set forth figures completely irrelevant to the case at trial. Although the net worth-expenditures method has come to be recognized as a proper means of proving a taxpayer's income (*Holland v. United States*, 348 U.S. 121 (1954); *Thomas v. Commissioner*, 223 F.2d 83 (6th Cir. 1955)) the fact remains that it is a difficult concept for the uninitiated juror. To overcome this obstacle, it has come to be common practice to use charts of the type here employed, which are usually referred to as "John Doe" charts. The use of the chart here in question by government counsel during the opening statement doubtless was of assistance to the jury in understanding the method employed, the explanation of the purpose of the use of the fictitious figures was fully explained, and the procedure did not constitute prejudicial error.

Rubino further argues that the trial court should have directed a verdict of acquittal of count one of the indictment for the reason that the government did not show that Rubino did not have a hoard of cash on hand on January 1, 1958, of some $25,000. Suffice it to say that the evidence received from the parties on this subject created an issue of fact and that there is evidence in the record taken as a whole to support the jury's verdict of guilty on count one.

Finally, Rubino contends that he was entitled to a directed verdict of not guilty on all four counts. Under this contention he repeats the argument made under his claim of entitlement to a directed verdict under count one on the ground that the government failed to show that he did not have a hoard of money on January 1, 1958. He further argues that the government failed to produce sufficient proof that the loan account of National Anode Corporation in his name was actually his sole investment rather than the joint investment of himself and one George Massu, and that he did not receive a loan of $50,000 from one Winderman.

All of these contentions simply present arguments going to the weight of the evidence. As we have already pointed out, there was evidence on both sides of the issues as to whether Rubino possessed a cash hoard at the beginning of the year 1958. Similarly, pro-and-con evidence exists in the record on the question of whether the National Anode loan was Rubino's or Rubino's and Massu's, and this situation also prevails with reference to the alleged Winderman loan. We feel constrained to observe on the basis of the record before us that while had the jury determined that Rubino possessed a cash hoard on January 1, 1958, that the National Anode loan was a joint Rubino-Massu investment and that appellant had borrowed $50,000 from Winderman we probably would feel required to permit the verdict to stand, we have no hesitation whatever in agreeing that the contrary resolution of these issues by the jury is supported by the greater weight of the evidence.

All the other contentions advanced by Rubino in support of his appeal have been considered. It is our conclusion that no reversible error is shown in the record.

Affirmed.

Peck, J., dissenting. I regret that I cannot join in the majority opinion for a number of reasons.

While I am in wholehearted accord with the doctrine which extends to the trial judge a large discretion in determining when news articles have resulted in prejudice (*Marshall v. United States*, 360 U.S. 310, 312 (1959), that exercise must be consistent with the facts set forth in the record. While the District Judge made no specific findings as to which and how many jurors read the offending material, the majority opinion undertakes a detailed summary in this regard. Unfortunately, I am unable to agree that these findings are supported by the record. For reasons which become apparent upon a reading of the transcript, it is impossible to state with certainty exactly how many members of the panel had read certain articles or had heard discussions concerning them in the jury room.[1] A fair reading of the transcript of that hearing, however, would seem to establish that two members read the article in the Detroit News, two read the article in the Detroit Free Press, while another stated that he read an article without specifying the paper. Five other jurors stated that they saw one or another of the articles but did not read them. Only four of the fourteen testified that they had neither seen nor read either of the accounts. Two copies of the Free Press of

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[1] An example of this difficulty may be seen in this question and answer:

"Q. [W]as Mr. Louisell discussed in the jury room today?
"A. Not to me, your Honor."

In the absence of a clarification, the nonresponsive answer leaves open the question of whether the juror heard a discussion about Mr. Louisell among other jurors. That the trial judge had some reservations in this area is apparent. Prior to expressing satisfaction as to the jurors' ability to render a fair and impartial verdict, he stated, "You really never know the extent of what the jurors saw or read."

January 22, 1969, were recovered from the jury room by the bailiff. The extent of the discussion within the jury room cannot, in my view, be satisfactorily determined.

While the statements of the jurors are accepted at face value, in passing it is observed without criticism of them that in the circumstances an understatement of the facts would be more normal than an overstatement. The jurors were neither specifically sworn nor reminded of any previous oath. Whether they spoke under the penalties of perjury presents an interesting question of law, but it would appear unlikely that the jurors considered themselves so bound. At the same time, they may well, however, erroneously, have felt that the subject newspaper stories were within the proscription of the Court's instruction under which they were prohibited from reading articles concerning the case being tried, and a natural reluctance to admit having read the stories would follow. By the same token, however, it can scarcely be doubted that any juror who stated that he read and discussed either article had done so.

For present purposes I assume the weakest case presented by the appellant and consider that only two members of the panel[2] read the article in The Detroit News referring to appellant as "Matthew (Mike the Enforcer) Rubino, reputed Mafia Leader," and deal only with the consequences of their exposure to the article in which that phrase appeared. Since proceeding on that assumption, I would first summarily sweep aside an oral argument presented by the government when this case was heard and apparently adopted by the majority to the effect that Rubino had the burden of moving that these two jurors be replaced by the alternates and that having failed to make such a motion he

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[2] The fact that the majority and I differ as to whether one or two had read this article does not alter the principles involved.

will not now be heard to complain. Alternates are provided to fill vacancies in a jury box resulting from misadventure, and are not sworn so that the defendant may be required to play Russian Roulette. Rule 24(c), Fed. R. Crim. P.

Assuming, then, that two members of the panel have read the offending material, and further assuming for the moment that the taint is of indelible nature, the question presented is how many rotten apples does it take to spoil the barrel. To hold that possession of prejudicial information by any number less than the panel's total invites endless and obviously futile speculation. For example, should we here speculate as to whether the two readers of The Detroit News were dominant and articulate or meek and quiescent members of the panel? To state such questions is to answer them, and I would hold that if the accused material is in fact prejudicial its possession by even one member of the panel must be fatal.

Before moving to a consideration of the virulence of the offending statement it is observed that none of the cases dealing with allegedly prejudicial material is in point because the leading Supreme Court opinions in this area deal with cases wherein the publicity was concerned with the case at trial. *See, e.g., Sheppard v. Maxwell,* 384 U.S. 333 (1966) (exposure of the jury to highly publicized and prejudicial accounts and comments concerning the trial); *Estes v. Texas,* 381 U.S. 352 (1965) (extensive television and broadcast coverage of the pretrial hearing and portion of the trial); *Rideau v. Louisiana,* 373 U.S. 723 (1963) (televised interrogation and interview of the accused where he confessed to several crimes); and *Irvin v. Dowd,* 366 U.S. 717 (1961) (intense community prejudice and jurors' sentiment of partiality against the accused).

Except in extraordinary circumstances (*Sheppard v. Maxwell, supra; Shepherd v. Florida,* 341 U.S. 50 (1951)),

the trial court has had and has exercised the means of insulating the jurors from tainting publicity, and there remained for adjudication only the issue of the effectiveness of the insulation or the result of such penetration through it as occurred. *See, e.g., Silverthorne v. United States,* 400 F.2d 627 (9th Cir. 1968); *Holmes v. United States,* 284 F.2d 716 (4th Cir. 1960); *Briggs v. United States,* 221 F.2d 636 (6th Cir. 1955); and *Marson v. United States,* 203 F.2d 904 (6th Cir. 1953). Therein the accusing finger has been pointed either at the trial judge for a failure to provide that insulation or at jurors who have circumvented it. Such is not the situation here, where the tainting material emanated from a source not only beyond the control of the trial court but from a source which would never reasonably fall within the most cautious judge's contemplation. Thus while these opinions provide much helpful reasoning none is controlling. The majority opinion places emphasis on the fact that "[t]here is no contention that any of this publicity was generated by a representative of the United States." I can see no significance in this circumstance. As Judge Cecil of this Court stated in a generally analogous situation, "Because we are concerned with the prejudicial effect of [the] statement, it is immaterial whether the actions of the prosecutor were intentional or otherwise. The specific question before us is whether the prejudicial effect of this incompetent testimony was cured by the admonition of the judge." *United States v. Smith,* 403 F.2d 74, 76 (6th Cir. 1968).

The determination as to whether the material under attack is prejudicial in the present context may best be resolved on the basis of whether its admission into evidence over objection would constitute grounds for a mistrial or for the subsequent vacation or reversal of a judgment entered on a verdict. Thus whether the receipt in evidence

of page 1 of The Detroit News of January 21, 1969, would constitute such prejudicial error becomes pertinent. No organization (if that be an acceptable term) today strikes such terror to the American heart as does the Mafia. A current best seller in the field of American fiction depicts its evils, as do both fictional and allegedly factual presentations by national media. Its corruptions are constantly chronicled and its atrocities in every area of unsavory activity are endlessly portrayed in vivid detail. We daily hear and read how the ill-gotten gains of its narcotic traffic, prostitution rings, usury rackets and murders by contract are invested in staggering sums in legitimate enterprises of every nature, frequently placing control in the hands of shadowy arch criminals. These observations are not based on facts that have not come into this record through admissible evidence safeguarded by confrontation and cross-examination of a witness testifying under oath, but neither did the appellant's characterization as "Matthew (Mike the Enforcer) Rubino, reputed Mafia leader," get into the record that way. *I am of the view that had this clearly inadmissible statement been received by the jury in the courtroom, no amount of judicial instruction could have eliminated its prejudicial effect.* (Emphasis supplied.) Similarly, I must conclude that the acquisition of prejudicial material outside the courtroom by at least two members of the jury in the present case requires reversal. I add that while standing alone the knowledge of at least some jurors of Judge Baum's deprecating if not incriminating references to Mr. Louisell probably would not constitute prejudicial error, this circumstance adds support to my conviction that the judgment should be vacated.

I would, however, reluctantly, vacate the judgment and remand the cause for retrial.

APPENDIX B

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX C

No. 19,621

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Matthew Rubino,
Defendant-Appellant.

ORDER

Before Phillips, Chief Judge, Peck and Brooks, Circuit Judges.

Upon consideration, it is ordered that the petition for rehearing be and hereby is denied.

Entered by order of the Court.

Carl W. Reuss
Clerk

The Detroit News

THE HOME NEWSPAPER

JANUARY 21, 1969 — 96th YEAR — No. 152 — 10 CENTS

Markets
Pages 14A to 16A
Races
Page 2D

Louisell accused of 'cat and mouse' game

Baum rebukes Vito's lawyer

JOSEPH W. LOUISELL
Accused of stalling

By JOHN H. CARLISLE
Detroit News Staff Writer

Defense counsel in the Vito Giacalone blackjack trial played "a cat and mouse game with the court," Wayne Circuit Judge Victor J. Baum charged today.

Judge Baum accused Joseph M. Louisell, chief counsel, of making "a sham claim of hospitalization" to delay the trial for months.

Judge Baum also charged that Louisell's claimed unavailability for the trial because he (Louisell) was a diagnostic checkup patient in an Ann Arbor hospital at the time, was "a ruse and pretext" done to "inject what he hoped would be reversible error" for an appeal to a higher court.

The court made these charges as he denied a defense motion for a new trial for Giacalone, now serving 4½ years in Jackson State Prison. Giacalone was convicted Nov. 14 by a jury in Centreville, Mich., for illegally possessing a blackjack.

Judge Baum delivered a 55-page written opinion in denying the motion, citing 75 legal cases in support of his decision.

The court said the defense lawyers, Louisell, Ivan E. Barris and Neil Howard Fink, had advanced 12 reasons for a new trial. Judge Baum said his decision would clear the way for the lawyers to take a similar action before the State Court of Appeals.

Judge Baum said the most significant claim of the defense for a new trial was that he had committed reversible error in compelling Giacalone to "proceed to trial with counsel other than his own choice."

Fink had asked for a delay of the trial while Louisell was in the hospital, and after making his own investigation on the telephone with the hospital and Louisell's doctor, Judge Baum ruled that Louisell was able to attend the trial. He ordered it to proceed.

Barris and Fink then tried the case in Centreville while Louisell remained in the hospital. The trial lasted one day and led to Giacalone's conviction by the jury.

"It is the same old story of passionately striving for a day

(Continued on Page 6A)

JUDGE VICTOR J. BAUM
Blasts the defense

Giacalone lawyer rebuked by Baum

Continued from Page One

or two of delay until Louisell could come under the protective umbrella of the Robbins trial," Judge Baum said, "and, hopefully, thus stave off the blackjack trial for a long time."

Manliere (Mike the Enforcer) Rubino, reputed Mafia leader, has since gone to trial for income tax evasion in Federal Court with Louisell as his lawyer. The trial is now in its second week.

"The blackjack trial in Centreville was not prejudiced by Louisell's failure to appear," Judge Baum said. "The case was brilliantly and skillfully tried for the defendant by Barris and Fink."

Judge Baum continued:

"They were playing this cat and mouse game with the court — they have an entire courtroom-day example in objecting to the sentencing procedure when it was too late to correct it without reopening the question of guilt.

"In shifting the defendant's position regarding argument of law to the jury after the jury was engaged in its deliberations, "In withdrawing objections to the absence of official court stenographers at the examination until after the examination was completed.

"Just as they had in claiming counsel's (Louisell's) disability when there was none."

THE DEFENSE ALSO CLAIMED that Giacalone should be given a new trial because, the defense said, Judge Baum erred in the sentencing procedure. The defense charged that Giacalone had not been notified that the court would take into consideration "hearsay information given to the court."

In sentencing Giacalone, Judge Baum charged that Giacalone was "maliciously dangerous," that he had "grown rich as a professional criminal," and that he was associated with "leading Mafia criminals in Detroit."

Judge Baum, in sentencing the defense claim for a new trial over his remarks, said that "the sentencing procedure of the court was in accordance with Michigan constitutional law.

"The defendant in the sentencing stage has no constitutional right to examine the probation report, to be informed by his attorney thereon or to confront or cross-examine such accusers."

Judge Baum pointed out that at the time of Giacalone's sentence, Louisell made no objections to the court's remarks. He made no motion then for a new trial on that basis, Judge Baum added.

"Even when has Louisell been so timid?" the court asked.

APPENDIX D

ıe Detroit News

THE HOME NEWSPAPER

Tuesday, Jan. 21, 1969

96th YEAR No. 132 10 CENTS

Markets
Pages 14A to 16A
Races
Page 2D

Louisell accused of 'cat and mouse' game

Baum rebukes Vito's lawyer

By JOHN M. CARLISLE
Detroit News Staff Writer

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JUDGE BAUM CONTINUED:

"They were playing this cat and mouse game with the court

(Concluded on Page 4A)

Giacalone lawyer rebuked by Baum

Continued from Page One

—as they have on other occasions—for example in objecting to the sentencing procedure when it was too late to correct it without reopening the question of guilt.

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"The defendant in the sentencing stage has no constitutional right to examine the probation report, to be informed by his accusers therein or to confront or cross examine such accusers."

Court Exhibit H

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APPENDIX D

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Detroit Free Press

THE SECOND FRONT PAGE

Page 3, Section A — Wednesday, January 22, 1969

Today's Chuckle

In our modern civilization, our subways aren't safe, our streets aren't safe, our parks aren't safe, but under our arms we've got complete protection.

...ed drink given him by old ... cedo that morning for Ram- ... little enthusiasm. ... pare with this." ... "There are a lot of memories ... have with the governor."

Judge Accuses Louisell of Plot

Retrial Denied To Vito Giacalone

BY TOM RICKE
Free Press Staff Writer

A judge accused Joseph Louisell, one of Detroit's most expensive and sought after defense attorneys, of using a subterfuge in an attempt to delay the trial of one of his clients, Mafia leader Vito Giacalone.

Wayne County Circuit Judge Victor J. Baum made the allegation in a 66-page opinion he wrote denying Giacalone's request for a new trial on charges of illegal possession of a blackjack.

Giacalone was convicted of the charge and was sentenced last month to 4½ to five years in jail. He is now serving his sentence at Jackson Prison.

In his opinion, Judge Baum said:

"There ought not in be one law for the rich and another for the poor. We do not allow the poor, unreasonably, to dam the flow of the court's business. We should not permit Vito Giacalone or Joseph Louisell unreasonably to delay justice."

Louisell had claimed that Giacalone was entitled to a new trial because Giacalone's right to obtain counsel was violated in the blackjack trial which took place Nov. 14 in Centerville, Mich.

Louisell had gone to University Hospital in Ann Arbor for a checkup a few days before the blackjack trial was scheduled to begin.

He had agreed to be available for the Nov. 14 trial, but on Nov. 12 sent a message to Baum that he would have to stay in the hospital longer than he expected.

Louisell claimed Giacalone wanted him and no other defense attorney to represent him.

In his opinion, Judge Baum said the Wayne Circuit Court had agreed to allow Louisell to delay other matters there to start a five-year-old case in federal court on Nov. 18 or as soon as the blackjack trial was over.

Judge Baum said that if he had allowed Giacalone a delay until Louisell got out of the hospital, the case "would have been delayed at least a quarter of a year."

BAUM SAID:

"I must conclude as a matter of fact that Mr. Louisell's claimed unavailability for trial of the blackjack case was a ruse, a pretext, interposing purely for his own convenience; for the purpose of obtaining unreasonable delay in the trial of the blackjack case; and for the purpose of artificially injecting the claim of erroneous deprivation of the right to counsel.

"There was not a shred, a particle or scintilla, of sworn evidence establishing that Mr. Louisell was, from a medical standpoint, disabled from trial of the case."

Louisell said a stay in the hospital had forced him to attempt to obtain a trial delay for his client. He said an appointment for the hospital visit made here made in September.

"I went to the hospital with the full knowledge and consent of Judge Baum," Louisell said. "It was not any subterfuge."

Louisell said his doctors had strongly recommended the hospitalization and that it involved a heart attack he had suffered some years ago.

Baum

Louisell

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 949

MATTHEW RUBINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial lasting nine weeks, petitioner was convicted on four counts of willful attempt to evade his individual income tax for the years 1958 through 1961 and was sentenced to consecutive prison terms of 2½ years on each count and fined $10,000 on each count (App. 353a).[1]

The sole question raised in the petition is whether petitioner was deprived of a fair trial by reason of

[1] The designation "App." refers to the Joint Appendix filed in the court below. The designation "R." refers to the transcript of the trial proceedings, and is preceded by the volume number and followed by the page number.

411-213—70

certain newspaper articles which appeared in the Detroit press about a week before the conclusion of the trial and which were shown to have been read by some of the jurors. Both articles related to Mr. Louisell, the defense attorney, and to another criminal case in which he represented a defendant. Throughout the instant trial the judge had repeatedly cautioned the jury against reading any newspaper articles or listening to any radio or television broadcasts relating to the case. The articles in question, however, did not fall within the proscription, since they related to another case. The article in the Detroit Free Press (Pet. App. D) made no mention of appellant, although it did recount some unflattering remarks made by another judge about defense counsel's pre-trial activity in the other case. The eleventh paragraph of the article in the Detroit News (Pet. App. D), upon which petitioner bases his primary complaint (Pet. 4, 7, 9, 12), refers to petitioner as a reputed member of the Mafia.

The trial judge interrogated each of the fourteen jurors, out of the presence of the others, about their exposure to the articles. He was "satisfied that the jurors who read the article or saw the headline referring to Mr. Louisell, were not influenced, and, in the court's opinion, are able to render a fair and impartial verdict in this case * * *." (34A R. 36). The court of appeals affirmed.

The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by

jurors of news articles relating to the trial. *Marshall* v. *United States,* 360 U.S. 310, 312; *Holt* v. *United States,* 218 U.S. 245, 251. "Generalizations beyond that statement are not profitable, because each case must turn on its special facts." *Marshall, supra,* 360 U.S. at 312. In the *Marshall* case, relied upon heavily by petitioner, the articles in question contained highly prejudicial material, which was read by seven of the twelve jurors and which, among other things, made it clear that the defendant had twice previously been convicted of felonies. It was held there that Marshall was deprived of a fair trial, but as the court below concluded in the case at bar (Pet. App. 19), "In our opinion the contents of these two newspaper articles do not measure up to the degree of prejudice which resulted in reversal in *Marshall.*"

Where, as here, there is no reason to believe that the newspaper stories came through or from the prosecution (Pet. App. 21), the burden of showing prejudicial harm rests upon the defendant. *Marshall* v. *United States,* 355 F. 2d 999, 1007 (C.A. 9), certiorari denied, 385 U.S. 815. Petitioner has not met that burden. Surely the article in the Detroit Free Press (Pet. App. D), which does not even mention petitioner, is not sufficiently prejudicial to warrant a new trial. Cf. *United States* v. *Cimini,* 427 F. 2d 129, 130 (C.A. 6), certiorari denied, November 9, 1970, Nos. 520 and 521, this Term. As for the article in the Detroit News, the court below found that "the record establishes affirmatively that only one juror read the paragraph in which Rubino was mentioned

as to which prejudice is claimed" (Pet. App. 17). If the defense thought that this article was prejudicial to them it should have asked, as the Court of Appeals noted, that this juror be replaced by one of the two alternate jurors, neither of whom had read either one of the articles (App. 327a–328a). The defense did not do so, and the two alternates were excused from the jury six days later when the jury began its deliberations (38 R. 158–159). Having failed to avail himself of the remedy afforded by Rule 24(c) of the Federal Rules of Criminal Procedure,[2] petitioner cannot now complain that he was deprived of a fair trial. Cf. Pet. App. 18, 21.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General,
JOHNNIE M. WALTERS,
Assistant Attorney General,
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

DECEMBER 1970.

[2] That rule provides for alternate jurors to replace jurors "who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties."

U.S. GOVERNMENT PRINTING OFFICE: 1970

SUPREME COURT, U. S.

FILED
MAR 11 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 949

MATHEW RUBINO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOSEPH W. LOUISELL
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2066 Penobscot Building
Detroit, Michigan 48226
WO 2-8210

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

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Petitioner, Mathew Rubino, hereby petitions the Supreme Court for rehearing of its order denying the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Petitioner's reasons are as follows:

I.

THE PETITIONER INCORPORATES BY REFERENCE ALL OF THE FACTUAL ALLEGATIONS AND LEGAL ARGUMENTS CONTAINED IN HIS PETITION FOR CERTIORARI HERETOFORE FILED IN THIS CAUSE.

II.

THE DECISION OF THE COURT OF APPEALS GROUNDED AS IT WAS ON THE STATEMENT THAT:

> "IN SUMMARY, THE DISTRICT JUDGE, AFTER INTERROGATING EACH JUROR SEPARATELY, DID NOT FIND THE 'SLIGHTEST REASON' TO BELIEVE THAT THE NEWSPAPER ARTICLES COULD INFLUENCE THE VERDICT IN ANY MANNER. WE CONCLUDE THAT THE DISTRICT JUDGE PROPERLY EXERCISED HIS DISCRETION BY GIVING ADEQUATE CAUTIONARY INSTRUCTIONS AND OVERRULING THE MOTION FOR A MISTRIAL."

WAS CLEARLY IN CONFLICT WITH DECISIONS OF THIS COURT WHICH HAVE JUDICIALLY RECOGNIZED THAT VOIR DIRE INTERROGATION OF JURORS IN PREJUDICIAL PUBLICITY SITUATIONS IS TOTALLY INADEQUATE TO DETERMINE THE ATTITUDES OF THE JURORS.

After extensively discussing the derogatory publicity that manifested itself during the trial of this case, the Court of Appeals concluded as follows:

> "In summary, the District Judge, after interrogating each juror separately, did not find the 'slightest reason' to believe that the newspaper articles could influence the verdict in any manner. We conclude that the District Judge properly exercised his discretion by giving adequate cautionary instructions and overruling the motion for a mistrial."

This Court, however, has explicitly recognized in *Irvin v. Dowd*, 366 U.S. 717 (1961) and *Rideau v. Louisiana*, 373 U.S. 723 (1963) that *voir dire* is often inadequate because

it is impossible to determine, much less defeat, the subtle operation of prejudice in a particular criminal trial.[1] *Voir dire* is at best of limited efficacy in judging whether or not jurors are prejudiced because the concept of *voir dire* relies upon an unrealistic faith in jurors' capacity to be totally candid about their opinions. Jurors brought before the Court to be interrogated in the presence of the accused, are under tremendous pressure to assert that they can act impartially. Empirical studies have recently given support to what all practicing lawyers knew to be a fact: that jurors in such situations are in fact less than candid.[2]

The jurors who read the prejudicial publicity, of course, asserted that they could nonetheless be impartial to petitioner. But even assuming that these jurors were completely candid, the fact is that the *voir dire* is a totally ineffective tool for getting at the unconscious prejudices which are the most serious threat to a defendant's right to a fair trial.[3]

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[1] On the ineffectiveness of *voir dire* see generally Standards Relating to Fair Trial and Free Press, 54 through 57, 75, 130 through 138 (A.B.A. Project on Minimum Standard for Criminal Justice (1966)). See also *Broeder, voir dire* Examinations: Empirical Study, 38 So. Cal. L. Rev. 503 (1965). This extensive study found that *voir dire* was greatly ineffective in ascertaining information that would show jurors to be unfavorable (pp. 502, 505, 528).

[2] *Broeder*, supra, n.1 38 So. Cal. Rev. at 506, 512 through 515, 528; Standards Relating to Fair Trial and Free Press, 57, 61, 136-137.

[3] For cases reversing on the grounds that jurors' statements of impartiality simply cannot be accepted in the face of significant potential for prejudice; see e.g., *Irvin v. Dowd*, 366 U.S. 717, 728 (1961); *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2nd Cir.), cert. *denied*, 372 U.S. 976 (1963); *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952); *United States ex rel. Shaffield v. Waller*, 126 F. Supp. 537, 542 (W.D. La. 1954), applic. *for prob. cause denied*, 224 F.2d 259 (5th Cir. 1955), cert. *denied*, 350 U.S. 922 (1955); *People v. Mallon*, 37 Cal. 2d 702, 235 P.2d 215 (1951); *People v. Hrycinak*, 5 Ill. 2d 176, 184, 125 N.E.2d 61, 65 (1954). See generally Note, *Impartial Jury—20th Century Dilemma: Some Solutions to the Conflict Between Free Press and Fair Trial*, 51 Corn. L. Q. 306, 316 (1966).

II.

THE HONORABLE COURT SHOULD, IN CASES WHERE THE ISSUE OF PREJUDICIAL PUBLICITY IS RAISED, BE AS VIGILANT IN REVIEWING CONVICTIONS FROM FEDERAL COURTS AS IT IS IN REVIEWING THE SAME ISSUES RAISED BY STATE COURT PROCEEDINGS.

In the past half century, this Court has reviewed a substantial number of state convictions involving constitutional questions related to pretrial and trial publicity. For example see *Shepherd v. Florida* (1951), 341 U.S. 50 (concurring opinion); *Irvin v. Dowd* (1961), 366 U.S. 717; *Rideau v. Louisiana* (1963), 373 U.S. 723; *Sheppard v. Maxwell* (1966), 384 U.S. 333; *Moore v. Dempsey* (1923), 261 U.S. 87; *U. S. ex rel. Darcy v. Handy* (1956), 351 U.S. 454; *Estes v. Texas* (1965), 381 U.S. 532; *Beck v. Washington* (1962), 369 U.S. 541; and *Stroble v. California* (1952), 343 U.S. 181.*

Most of these cases generated extensive and multiple opinions in this Court. During the same period, by way of contrast, not a single authored opinion has come out of this Court relating to pretrial or trial publicity in a Federal case. Only once has the Court written on this subject at all and that was the brief *per curiam* opinion in *Marshall v. United States* (1959), 360 U.S. 310.

The failure of the court to consider such questions in the context of a Federal prosecution was not from a lack of opportunity. The issues have been unsuccessfully tendered to this court on many occasions. For example, see *Miller v. United States*, 392 U.S. 929, denying certiorari to *U. S.*

* Decision in each case did not always turn on the publicity issue nor was the prisoner always successful. The only point we make is that this Court was willing to review the questions.

v. *Miller*, 381 F. 2d 529, and the number of cases cited in the annotation at 3 L. ed 2d 1230 wherein this court denied certiorari to review such questions in Federal prosecutions.

This Court has often said that the administration of justice must not only be fair but it must have the appearance of fairness. The Court should rightly concern itself with the appearances created by the exercise of its powers. If it appears that this Court is ignoring its own backyard while enforcing a cleanup program against the state courts, such will not promote the harmony which should exist among the partners in our dual judicial system.*

WHEREFORE, Petitioner respectfully requests this Honorable Court reconsider its denial of the petition for writ of certiorari and grant the same.

Respectfully submitted,

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WO 2-8210

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*Appearances can be deceiving. For example, this court summarily reversed a Federal conviction in *Jacko v. United States*, 366 U.S. 716 because of prejudicial trial publicity, but it did so without opinion. The judicial politics of our dual system requires that this Court let the states know by formal opinion from time to time that it is imposing upon the Federal Courts the same limitations that it imposes upon the state courts in this area of trial publicity.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies to this Court that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58, Paragraph 2 of the Rules of this Court.

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